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CIRCUIT COURT OF KING GEORGE COUNTY.

TAYLOE V. ROSE.*

December 1, 1904.

1. UNLAWFUL ENTRY AND DETAINER—*Object of.* The remedy of unlawful entry and detainer was designed to protect the *actual possession*, whether rightful or wrongful, and to afford summary redress and restitution.
2. UNLAWFUL ENTRY AND DETAINER—*Title not involved.* Title is not involved in the action of unlawful detainer, and evidence of title is often inadmissible.
3. UNLAWFUL ENTRY AND DETAINER—*Right of possession—Actual possession.* If the defendant enters upon lands of the plaintiff unlawfully, the plaintiff is entitled to recover possession without any regard to the right of possession, the actual possession giving the plaintiff the right of possession against any party not having the right of entry.
4. UNLAWFUL ENTRY AND DETAINER—*Entering one's own premises.* A person may render himself liable to an action of forcible entry and detainer by entering on his own premises, even when he has the right of immediate possession.
5. RES JUDICATA—*Matter in second suit in issue in first.* To render a former judgment or decree a bar as *res judicata*, or estoppel, in the second suit, about the same matter, not mere matter of defense, the matter of the second suit must have been actually in issue in the first.
6. EQUITY—*Rescission of contract on proof of insolvency.* Equity can relieve by granting a rescission of the contract upon the allegation and proof of insolvency of the defendant and his inability to respond in damages.

Upon a bill in equity to cancel a contract.

The opinion states the case.

W. D. Wirt and William A. Rose, for complainant.

C. H. Ashton, for defendant.

HON. JNO. E. MASON, Judge:

On 25th of March, 1903, F. P. Tayloe, the complainant, entered into a contract with the defendant, W. A. Rose, a merchant, by which Tayloe "rented" [to Rose] the storehouse at Stiff's wharf on the Potomac river, and said Rose on his part agreeing to pay \$50.00 per year, and also to attend to the meeting of the steamers at the wharf free of charge . . . and this "lease" is to be continued on same terms yearly, "*if satisfactory to the party of the*

*Reported by George C. Gregory.

second part." These are the essential features of the contract. It is a contract which Tayloe, whether willing or not, must renew from year to year if Rose desires such renewal.

On 16th of August, 1904, in the face of this contract, Tayloe sued out of the clerk's office of the Circuit Court of King George a writ of unlawful entry and detainer to recover possession of the storehouse. On the 2nd day of September following the case was tried in said court and this trial resulted in a verdict and judgment for the defendant. On the 5th day of September Tayloe wrote Rose a note, which was delivered personally by two friends, demanding that he meet the steamers at the wharf according to the terms of his contract, and also through a third person handed him a manifest with a request that he take it and meet the steamers. At the October rules Tayloe filed his bill in chancery, the main allegations of which are the failure of Rose to comply with an essential condition of his contract, the insolvency of Rose, and asking that the contract be delivered up and cancelled.

The defendant filed a plea in bar setting up the verdict and judgment in the unlawful detainer case, and vouched the record.

The complainant in this suit on his cross-examination has proved that the same property and the same parties are involved.

Two main questions are presented for decision:

First.—Is the verdict and judgment in the unlawful detainer case a bar to this suit in equity?

Second.—If it is not, should the court rescind the contract between Tayloe and Rose?

The first question involves an investigation into the meaning and effect of a judgment on a writ of unlawful detainer.

It is well settled that title is not involved in the action of unlawful detainer, called in many jurisdictions, action of forcible entry and detainer, and that evidence of title is often inadmissible. 13 Am. & Eng. Encyc. of Law (2nd ed.) 753-764. In tracing the meaning of the writ, it seems further to be settled under most statutes that "the question of right of possession is not involved, since the enquiry is *limited* to *actual* and peaceable possession of the plaintiff or *unlawful* detainer of the defendant. A person may render himself liable to an action of forcible entry and detainer by entering on his own premises even when he has the right of immediate possession." 13 Am. & Eng. Encyc. of Law (2nd ed.) 756, citing

numerous state and some United States authorities, among the citations being *Olinger v. Shepherd*, 12 Gratt. 462, and *Fore v. Campbell*, 82 Va. 808. In the last case our court holds that if the defendant entered upon lands of the plaintiff unlawfully, the plaintiff is entitled to recover possession without any regard to the right of possession, the *actual* possession giving the plaintiff the right of possession against any party not having the right of entry. In *Davis v. Mayo*, 82 Va. 97, it is held that "the remedy of unlawful entry and detainer was designed to protect the *actual possession*, whether rightful or wrongful, and to afford summary redress and restitution;" and again, "the judgment in unlawful detainer *settles nothing* between the parties in regard to the title, or right of possession." Authorities could be multiplied, but all would bring us to the same conclusions. 2 Bart. L. Pr. 1156-57.

At the date of the writ of unlawful detainer shown as an exhibit with defendant's plea, Rose was in actual possession of the premises at Stiff's wharf. He was not at that time there unlawfully or without authority, but by virtue of the contract under seal between Tayloe and himself. The *actual possession*, or we may in this case go so far as to say the right of possession, at the date of the trial was only in issue. The issue in this summary remedy at law was necessarily narrow and circumscribed. He had not abandoned his lease, because he was in actual possession at that time by virtue of his contract.

The cancellation of the contract could not have been put in issue at that trial; the trial court was without power or jurisdiction to have decided such a question. The insolvency of the defendant was not in issue and could not have been. The note written by Tayloe to Rose on the 5th day of September, 1904, could not, of course, have been given in evidence at the trial on the (2nd) second day of same month. The demand made in that note, and the refusal of Rose to comply with that demand, were subsequent to this trial.

All the authorities cited to support the plea of the defendant, reiterate the general rules as to *res judicata* and estoppel, but in the light of authorities cited in this opinion they do not apply, because: First—If there were no other reasons, the first suit relied on as a bar was only an action of unlawful detainer. Second—All doubts upon this point might be put at rest by the decision in *Harrison v. Manson*, 95 Va. 593. There it is held that a judgment in an action

of unlawful detainer is no bar to the right to institute a suit in chancery to set aside, on the ground of fraud, a deed under which the land in controversy was claimed, and the court further holds that the doctrine of election of remedies has no application. Third—In further answer, however, to the contention of counsel, when the inherent nature of the action of unlawful detainer is distinctly borne in mind—its purpose and its scope—and the matters which could not have been in issue or in evidence in the first trial, another principle must be applied instead of that so forcibly urged by him, and this other principle may be thus stated: "To render a former judgment or decree a bar as *res judicata*, or estoppel, in the second suit, about the same matter, not mere matter of defense, the matter of the second suit must have been actually in issue in the first. *The pleadings of the first suit must be such that the party could have proven and had it passed on.*" *State v. McEldowney*, 47 S. E. 650; *Tarter v. Wilson*, 95 Va. 19; *Southern R. R. v. Washington etc. R. R.*, 102 Va. 483, and cases cited.

But counsel for defendant puts great stress upon the evidence of complainant brought out on cross-examination, wherein he, in substance, states that he (the defendant) instituted this suit to recover the possession of the storehouse; that the action of unlawful detainer was for the identical purpose, that the two suits are one and the same, and are practically based on same state of facts, and counsel argues from this that the identity of the issues has been established. The questions and answers were excepted to. The court is of opinion that the examination of the witness along this line merely elicited from him legal conclusions, and was, in effect, to get from him what the court is now called upon to give—an opinion upon the difference between the two.

In his examination in chief, except as to the insolvency of the defendant, the complainant confined himself to facts arising since the unlawful detainer case which proved how the defendant had failed and refused to perform his part of the contract, and this was borne out by other testimony sustaining the allegations of the bill, which could by no possibility have been in the action of unlawful detainer.

The opinion of the court, therefore, is that the plea must be rejected.

RESCISSION OF THE CONTRACT.

It is settled law that equity has the power to compel the cancellation of papers. 1 Pom. Eq., secs. 110-111, 180; 3 Id. 1377. The only question is the propriety of the exercise of this power in a particular case, and equity can relieve by granting a rescission of the contract upon the allegation and proof of insolvency of the defendant and his inability to respond in damages. Pom. Eq., *supra*.

Rose's obligation to meet the steamers is an essential part of the consideration of the contract. It created a continuing obligation on his part, and under the allegations in the bill, and evidence in the record, there is no adequate remedy at law for the failure to perform this obligation. *Lowman v. Crawford*, 99 Va. 588. The meeting of the steamers at the wharf involved important duties, and daily attendance, including Sunday. Rose assumed all the duties of a wharf agent—that is, what his contract made him. *The fifty dollars rental mentioned in the contract, taken by itself, would be merely a nominal price per year for the premises.* It is easy to conceive how Tayloe can be greatly damaged by an insolvent man's failing and refusing to meet the important and essential obligation of a wharf agent, still holding on to the contract, and claiming the storehouse and premises by virtue of that contract. It is also easy to conceive how Tayloe, by this failure and refusal, can suffer irreparable damage, for there are duties of serious nature imposed by law upon Tayloe, for which he is accountable to his lessor, if not to the patrons of the wharf, when he undertakes to run a steamboat landing for the benefit of the public. That Rose has failed and refused to perform this essential and continuing obligation of his contract there is no shadow of doubt from the evidence in the record. He not only refuses to comply with the contract, but refuses to surrender it, claiming he has the right to the premises for the \$50.00 rental alone, by virtue not only of the contract, but of the verdict and judgment in the unlawful detainer case. It will not do to say the complainant has no remedy in the case now presented for decision. There should be no doubt as to the power of a court of equity to have this contract delivered up and cancelled.

Furthermore, it is a familiar principle applied in actions of law, that, "if during the performance of a contract, or after the time for performance arrives, one of the parties, by word or act, openly

and clearly refuses to perform his promise in whole or in part, the other party is thereupon exonerated from performing his part of the contract and is at once entitled to bring action." Clark on Con., 648; *James v. Kibler*, 94 Va. 165.

The defendant in this case having openly and clearly refused to perform his promise, and the complainant, being thus "exonerated" from performing on his part, and having no adequate remedy at law owing to the total insolvency of the defendant, the complainant has the right to ask a court of equity to compel the delivery up of the contract, which the defendant refuses to do and refuses to perform.

NOTE BY THE COURT.—The decree directed the defendant to deliver up the contract to the clerk of the court that the same might be cancelled, and also directed a writ of possession, the complainant having in his bill asked that he be restored to the possession of his storehouse.